Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

v.

WILLIE WILLIAMS, III,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE EX POST FACTO CLAUSE PROHIBITS REVOCATION OF AN INMATE'S GOOD TIME CREDITS AS PUNISHMENT FOR A PAROLE VIOLATION, UNDER STATUTORY AUTHORITY ENACTED IN 1983, WHICH WAS AFTER THE INMATE'S 1981 CRIMINAL CONVICTION, BUT WAS PRIOR TO HIS 1987 PAROLE VIOLATION?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Joe Class, Warden, South Dakota State Penitentiary, and Mark W. Barnett, Attorney General, State of South Dakota, hereby respectfully pray that a writ of certiorari issue to review the judgment and opinion the Eighth Circuit Court of Appeals entered in the above-entitled proceeding of August 31, 1994.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 33 F.3d 1010 (8th Cir. 1994) and is reprinted in the Appendix hereto at A-1. The memorandum decision of the District Court for the Southern District of South Dakota (Jones, John B.) has not been reported. It is therefore reported in the Appendix at A-6. The opinion of the South Dakota Supreme Court was delivered on July 1, 1992 and appears at 488 N.W.2d 667 (S.D. 1992). It is set out at Appendix A-15.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

v.

WILLIE WILLIAMS, III,

Respondent.

JURISDICTIONAL STATEMENT

Invoking federal jurisdiction under 28 U.S.C. § 2254, Respondent Williams brought a Petition for Writ of Habeas Corpus in the District Court for Southern District of South Dakota. On July 23, 1993, the District Court granted Respondent's Motion for Summary Judgment and for other relief. See App. A-17, infra.

In an opinion issued on August 31, 1994, the Eighth Circuit Court of Appeals entered judgment affirming the Southern District's order and directed that Respondent be released from custody subject to the resolution of any detainers that were pending against him. The Petitioner's request for rehearing was denied by the court in an order dated October 20, 1994.

The jurisdiction of this court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, section 10, states:

> "No State shall...pass any... ex post facto law."

The statute at issue here, SDCL 24-15-24, as amended in 1983, states:

> If the board of pardons and paroles is satisfied that any provision of § 24-15-20 has been violated, it may

> revoke the parole and reinstate the terms of the original sentence and conviction or it may modify conditions of parole and restore parole status. In addition, the board is authorized to order the reduction of time in full or in part for good conduct granted under § 24-5-1. If the board does not find that the provisions of § 24-15-20 have been violated, it may restore the parolee to the original or modified terms and conditions of his parole.

(SL 1983, ch. 201). SDCL 24-15-21, as revised in 1986 (SL 1986, ch. 209) states:

> If the executive director of the board is satisfied that any provision of § 24-15-20 has been violated, the executive director may issue a warrant to the warden of the penitentiary, any law enforcement officer, or any parole agent, directing that the parolee named be arrested and returned to the state penitentiary under the term of his original conviction and sentence, pending a hearing on the alleged violations. On the issuance of the warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation. The board shall credit the inmate with time spent in custody as a result of the parole violation.

STATEMENT OF THE CASE

In this case, the State of South Dakota seeks review of the determination of the Eighth Circuit Court of Appeals that revocation of Respondent's good-time credits for a violation of his parole, pursuant to SDCL § 24-15-24, violated the ex post facto clause.

The relevant facts are as follows. Respondent was convicted of first degree rape in December 1981 and was sentenced to fifteen (15) years in the state penitentiary. Matter of Williams, 488 N.W.2d 667, 668 (S.D. 1992); App. A-32. In 1983, the South Dakota Legislature amended SDCL 24-15-24 to authorize the Board of Pardons and Paroles to order the reduction of time granted for good conduct in the event of a parole violation.

When Respondent was later released on parole on December 21, 1984, he signed a standard parole agreement wherein he

acknowledged that "in the event I am returned to the institution, and my parole is revoked, I understand that I may lose any or all of my good time." Matter of Williams, 488 N.W.2d at 668; App. A-33. After signing the aforementioned parole agreement, Williams was allowed to return to his home state of South Carolina.

On August 21, 1987, Williams was convicted in South Carolina of writing a fraudulent check. The South Dakota Board of Pardons and Paroles was informed of that conviction on February 2, 1988, and issued a warrant for Williams arrest. Matter of Williams, 488 N.W.2d at 668; App. A-34. At the time the Board issued its arrest warrant, Williams had again been arrested in South Carolina and charged with first degree murder. State v. Williams, 400 S.E.2d 181 (S.C. 1991).

William's subsequent murder conviction was reversed in January 1991, and the case was remanded for a new trial. After learning that

Williams was again awaiting trial in South Carolina, the South Dakota State Penitentiary contacted the Charleston County Jail and informed it of the warrant that had been issued for his arrest. Matter of Williams, 488 N.W.2d at 668; App. A-34. When Williams later posted bond in South Carolina, authorities there detained him pursuant to the South Dakota warrant. He was returned to South Dakota on April 3, 1991.

A hearing was held before the South Dakota Board of Pardons and Paroles on April 26, 1991, to determine whether Williams' parole status should be revoked. During this hearing, Williams admitted that he had been convicted of passing a fraudulent check. Matter of Williams, 488 N.W.2d at 669; App. A-35. An order was therefore entered revoking Williams' parole. In addition, the Board ordered the loss of six years good time

credit. Matter of Williams, 488 N.W.2d at 670; App. A-35.

FEDERAL QUESTION PRESENTED BELOW

The constitutional question presented to the State Supreme Court was whether application of the 1983 version of SDCL 24-15-24 constituted a violation of the ex post facto clause. Matter of Williams, 488 N.W.2d at 670; App. A-40. Quoting Weaver v. Graham, 450 U.S. 24 (1981), the South Dakota Supreme Court held that in order for a penal law to be considered ex post facto, it "must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it."

A majority of the court concluded that SDCL 24-15-24 was not applied retrospectively in this case. Matter of Williams, 488 N.W.2d at 670; App. A-41. The majority found that the statute was enacted and in effect before

Williams was convicted of passing fraudulent checks in 1987, the offense which caused the application of the 1983 statute permitting the revocation of his good time. There was thus no valid ex post facto objection.[1]

An application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 was thereafter filed by Williams in United States District Court on October 16, 1992, raising this same ex post facto challenge. In its memorandum opinion issued on July 23, 1993, the district court rejected the findings of the State Supreme Court and ordered that Williams' petition for writ of habeas corpus be granted. Relying on Greenfield v. Scafati, 277 F.Supp.

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[1]Applying the same analysis, the State Supreme Court concluded that SDCL 24-15-21, which suspended the running of Williams' parole supervision time, upon the issuance of an arrest warrant by the Parole Board had also not been applied retroactively. Matter of Williams, 488 N.W.2d at 670; App. A-39. That statute was found to have been applied to Williams parole violation in 1987.

644 (D.Mass. 1967) aff'd mem. 390 U.S. 713 (1968), the district court held that application of SDCL 24-15-24 in the instant case violated the constitutional prohibition against ex post facto laws. App. A-27-30. The facts in that case were said to be analogous to those here in that Scafati involved a Massachusetts' statute passed after Petitioner was sentenced but before he was paroled. The statute was invoked upon Petitioner's violation of parole and return to prison.

The state appealed to the Eighth Circuit on August 11, 1993. In an opinion issued on August 31, 1994, the Eighth Circuit upheld the district court. Williams v. Lee, 33 F.3d 1010, 1012 (8th Cir. 1994); App. A-9. The Eighth Circuit indicated that it was constrained to hold that SDCL 24-15-24 was applied retrospectively in violation of the ex post facto clause. Id. at 1014; App. A-15,

stating that other federal courts had uniformly followed Scafati.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DIRECTLY CONFLICTS WITH THE DECISION OF THE SOUTH DAKOTA SUPREME COURT.

The State requests this Court to grant certiorari in this case on the basis of a clear and unequivocal conflict between the Supreme Court of the State of South Dakota and the Court of Appeals for the Eighth Circuit regarding whether the ex post facto clause precludes the application in this case. The decision of this Court of Appeals creates almost insurmountable difficulties in the operation of the prison system of the state of South Dakota and of any other state affected by the decision of the Court of Appeals for the Eighth Circuit. See generally, Braxton v.

United States, 500 U.S. 344, 347 (1991); Baldwin v. Alabama, 472 U.S. 372, 374 (1985).

The nature of the conflict giving rise to grounds for grant of the certiorari is as follows.

In Matter of Williams, 488 N.W.2d at 670, the South Dakota Supreme Court traced the chain of events in the Williams story, and held "there was no retrospective application of the 1983 statute" in that the "1983 statute was enacted and in effect when Williams was paroled in 1984." Id. The Court rejected Williams' argument that the statute was being applied to his 1981 conviction holding that the statute was applied to the 1987 parole violation: his conviction in South Carolina for writing a fraudulent check. Id.

The Eighth Circuit in Williams v. Lee, 33 F.3d 1010, 1014 (8th Cir. 1994) came to precisely the opposite conclusion on the same facts. The Court of Appeals determined that

"South Dakota's application to Williams of the good-time forfeiture provision violates the ex post facto clause." Id.

Essentially, the South Dakota Supreme Court and the Eighth Circuit Court of Appeals disagreed as to whether this case is controlled by this Court's summary affirmance in Greenfield v. Scafati, 277 F.Supp. 644 (D.Mass. 1977) (three judge panel) aff'd mem., 390 U.S. 713 (1968), or the Court's later opinion in Weaver v. Graham, 450 U.S. 24 (1981).

The Eighth Circuit found that the 1968 Memorandum Decision in Scafati controlled this litigation; the South Dakota Supreme Court's decision is premised on the later Weaver v. Graham decision.

The State submits that Scafati, has been undermined by this Court's plenary decision in Weaver v. Graham, 450 U.S. at 29, in which this Court established that, for the ex post

facto ban to be applicable, the law must be retrospective, that is, it must apply to events occurring before its enactment. Here the law is not "retrospective." Instead, the 1983 Amendment was applied only to events occurring after that date.

In this case, Petitioner was not paroled until 1984, did not sign his parole agreement until 1984, and did not violate his parole until three years later in 1987.

The parole violation in 1987 caused application of the 1983 statute. The Court of Appeals attempted to distinguish our case and Weaver by quoting Weaver to the effect that what was critical to relief under the ex post facto clause is

> the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.

Williams v. Lee, 33 F.3d at 1013, citing Weaver, 450 U.S. at 30, 101 S.Ct. at 965.

The court of appeals found essentially that the phrase "when the crime was consummated" necessarily referred to the time when the prisoner had committed the original criminal acts for which he was imprisoned and not the subsequent act(s) giving rise to the parole violation. Williams, 33 F.3d at 1013. (Emphasis added.) This analysis, however, is flawed. The Eighth Circuit's determination prevents the State from addressing the violation of the conditions of the supervised release separately from the criminal conduct which led to the prisoner's original incarceration. This Court's ex post facto jurisprudence does not so dictate. The South Dakota Supreme Court recognized the inherent distinction in its finding that Williams was, in reality, being punished for his 1987 parole violation and not his 1981 conviction. Matter of Williams, 488 N.W.2d at 670.

It must be remembered that Williams has no constitutional right to parole. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7 (1979). See also Dace v. Mickelson, 816 F.2d 1277, 1281 (8th Cir. 1987) (South Dakota statute does not create protected liberty interest in parole). The release of an inmate on parole is purely discretionary. Indeed, the South Dakota Parole Board, like all state parole boards, is empowered by statute to place a number of restrictions upon the parolee prior to his release.[2] The inmate, of course, is not required to accept a conditional parole. Winters v. Solem, 444 N.W.2d 722, 723 (S.D. 1989). Having done so, Williams was required

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[2]Statute provides, in pertinent part, that: the board may place reasonable restrictions upon the parolee which are designed to continue his rehabilitation.... All restrictions shall be in writing and shall be agreed to and signed by the parolee. SDCL 24-15-11.

by state law to abide by the conditions imposed by the parole board. It was his subsequent violation of the conditions of his supervised release rather than the original conviction which led to the revocation of his good time.

Another difficulty with the decision of the Eighth Circuit in this case is that it fails to consider the effect on prison administration.

Taken to its apparent logical conclusion the impact of the Eighth Circuit's decision could severely limit the ability of prison officials to enact or amend rules which proscribe unsatisfactory conduct within a correctional institution, and would impose unjustified constraints on the state legislative process.

For example, if a new regulation is needed to deal with the misuse of computers, it will be argued that it cannot be applied to

those convicted before the regulation was promulgated. Similarly, when it becomes apparent to the prison officials that additional regulations are needed to control other various types of disruptive behavior, the regulations will be argued not to be applicable to existing inmates.

The alternative arguably demanded by the Eighth Circuit opinion is application of different sanctions to different groups of prisoners and creation of hierarchies of punishment within the prison with regard to different prisoners. It is, however, simply not feasible, from the standpoint of prison order, to run an institution in which some inmates are wholly or partially immune from punishment for conduct for which others receive serious penalties.

The apparent impact of the Eighth Circuit's analysis on both the prison administration and the state legislative

process can also be concretely demonstrated by reference to recently amended South Dakota law. In 1993, the South Dakota legislature authorized the State to revoke the accumulated good time of an inmate who, while incarcerated, evinces an intent to reoffend upon release. SDCL 24-2-18. Under the South Dakota Supreme Court's interpretation of the ex post facto clause, this statute may be applied to any inmate who evinces such intent at any time after the statute was enacted, thus treating all inmates alike.

The Eighth Circuit's ex post facto analysis, on the other hand, appears to allow the application of this statute only to those inmates convicted of the underlying crime after this statute was enacted. Under this analysis, two inmates evincing the same intent to reoffend after enactment of the statute may be subject to vastly different treatment within the institution. Only one of the

inmates would be subject to discipline through loss of good time.

The prospect of different rules governing the behavior of different inmates within the institution, would create insurmountable difficulties in prison management, and may effectively stifle the state legislative process. In the interest of effective prison management, the state legislature may be precluded from enacting laws to respond to changing conditions within the institution and in society. The purpose of the ex post facto clause is to restrain arbitrary and potentially vindictive legislation, not to frustrate the legitimate legislative process operating in the interest of society as a whole. Weaver v. Graham, 450 U.S. at 29, (citing Malloy v. South Carolina, 237 U.S. 180, 183 (1915)).

The decision of the South Dakota Supreme Court allows rational management of the state

prison systems; the conflicting decision of the Eighth Circuit Court of Appeals threatens prison management.

II

THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF SEVERAL OTHER CIRCUIT COURTS.

Certiorari is also appropriate to resolve the conflict between the decision of the Eighth Circuit Court of Appeals and the decisions of various other circuit courts. See, e.g., Supreme Court Rule 10.1(a); McElroy v. United States, 455 U.S. 642, 643 (1982).

As noted above, the Eighth Circuit Court of Appeals in the instant litigation held that a state law enacted after a defendant's conviction but before the grant of parole could not be applied to violation of that parole. The holding was premised on the erroneous belief that this case was dictated by Greenfield v. Scafati, 277 F.Supp. 644 390

U.S. 713, (D.Mass. 1967) aff'd mem., 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968). The Eighth Circuit Court, relying on United States v. Paskow, 11 F.3d 873 (9th Cir. 1993), stated that other federal courts uniformly have followed Scafati and that it was therefore constrained to do the same. Williams v. Lee, 33 F.3d at 1014.

In fact the federal courts have been anything but "uniform." In Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993) certain prisoners claimed violation of the ex post facto clause when the state imposed a "loss of good-time credits" on an inmate who refused to provide a blood sample. 11 F.3d at 45. The prisoner's underlying offenses had been committed in 1986 and 1987 and the law and regulations at issue were promulgated in 1991 and 1992.

The Fourth Circuit Court of Appeals, relying on an earlier decision of the same circuit, Jones v. Murray, 962 F.2d 302 (4th

Cir. 1992) (cert. denied ___ U.S. ___, 113 S.Ct. 472 (1992) found that the regulation "does not violate the ex post facto clause." The court found that the "penalties for prospective violations by the inmates" may be increased by the law even if they involve the "loss of good-time credit." 11 F.3d at 486. According to the Court, the amended guidelines did not add to the punishment for which the inmate was incarcerated but were only for "new conduct constituting a violation of prison regulation." 11 F.3d at 487.

Similarly, the Ninth Circuit Court of Appeals has rendered a decision squarely in conflict with that of the Eighth Circuit. In United States v. Schramm, 9 F.3d 741 (9th Cir. 1993) the court considered a case in which the defendant had plead guilty in 1988 and had been sentenced to thirty-seven months imprisonment and three years of supervised release. At the time of sentencing, the

applicable guidelines were silent as to whether the sentence imposed upon revocation of supervised release was to run concurrently or consecutively with the sentence imposed for the new criminal offense. After the sentencing, however, the sentencing guidelines were amended to provide that any term of imprisonment imposed upon revocation of supervised release was to be served consecutively to any sentence the defendant was serving.

Because the guidelines had been amended before the defendant violated the terms of the supervised release, the court found that there was no ex post facto violation. According to the court, the guidelines were not applied "retroactively" because they were not applied to conduct completed prior to their enactment. United States v. Schramm, 9 F.3d at 743. In so holding, the court relied in part in United States v. Bermudze, 974 F.2d 12, 14 (2d Cir.

1992) in which the Court of Appeals for the Second Circuit had held that a violation of the supervised release was, for the purposes of the ex post facto clause, an offense separate from the offense that led to the initial imprisonment. United States v. Schramm, 9 F.3d at 743.

This same result has been reached by a number of other circuits. See, e.g., United States v. Blackston, 940 F.2d 877, 882 n.7 (3rd Cir. 1991) (violation of supervised release is a separate offense...) cert. denied ____ U.S. 112 S.Ct. 611, 116 L.Ed.2d 634 (1991), United States v. Celestine, 905 F.2d 59, 60 (5th Cir. 1990) (Imprisonment for violation of supervised release term does not extend primary prison term.)

The Eleventh Circuit Court of Appeals in United States v. Green, 810 F.2d 999, 1000 (11th Cir. 1986) found that a statute increasing a sentence for a felon in possession of a

firearm could be held applicable to an offender because the possession occurred after the effective date.[3] The same result was later reached in United States v. Patterson, 820 F.2d 1524, 1527 (9th Cir. 1987) where the Ninth Circuit Court of Appeals concluded that a statute increasing the sentence for possession of a firearm while on bail could be applied to one already on bail provided that possession occurred after the effective date.

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[3]Indeed, while the Eighth Circuit Court of Appeals in this case found itself to be compelled by the 1968 summary affirmance in Scafati, its earlier cases indicate adherence to the position ultimately adopted by the South Dakota Supreme Court. See, e.g. Munger v. Erickson, 979 F.2d 1323, 1325 (8th Cir. 1992) (amended sentencing guidelines were in effect before defendant committed subsequent offense and he was therefore unnoticed at previous felony convictions would be counted at felonies in future sentencing proceedings); Schwindling v. Smith, 777 F.2d 431, 433 (1985) (statute lengthening time before prisoner would become eligible for parole because the fourth offender status did not violate ex post facto clause where a crime for which he was incarcerated was committed after enactment of the statute); Garner v. Howell, 840 F.2d 660 (8th Cir. 1988).

Unlike the Eighth Circuit Court of Appeals, these courts, as well as the South Dakota Supreme Court recognized that the triggering event was not the original offense, but rather the commission of a new infraction, one that occurred after the ineffective date of the statute.

CONCLUSION

For the foregoing reasons, Petitioners respectfully requests this Court to grant the Petition for Writ of Certiorari.

Dated this 18th day of January, 1995.

Respectfully submitted,

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APPENDIX

APPENDICES

A. Opinion of the Court of Appeals for the Eighth Circuit is reported at 33 F.3d 1010 (8th Cir. 1994). A-1

B. Memorandum decision of the District Court for the Southern District of South Dakota (Jones, John B.) has not been reported. It is therefore reported in the Appendix at A-6. A-17

C. Opinion of the South Dakota Supreme Court was delivered on July 1, 1992 and appears at 488 N.W.2d 667 (S.D. 1992). A-32

D. Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc A-58

Appendix A

WILLIE WILLIAMS, III,

Appellee,

v.

STEVEN W. LEE, WARDEN, SOUTH DAKOTA STATE PENITENTIARY; MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Appellants.

No. 93-3063.

United States Court of Appeals,
Eighth Circuit.

Submitted May 9, 1994.

Decided Aug. 31, 1994.

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

After Willie Williams, III, who currently is confined at the South Dakota State Penitentiary, violated his parole, the state of South Dakota, acting on the authority of legislation enacted after Williams had committed the offense that resulted in his conviction and sentence, revoked his accumulated good-time credits. The District

Court[1] concluded that the state thereby had violated the Ex Post Facto Clause, and it granted Williams a writ of habeas corpus. The state appeals. We affirm.

I.

In December 1981, Williams pleaded guilty in a South Dakota state court to first-degree rape. See Williams v. State, 349 N.W.2d 58 (S.D. 1984). He was sentenced to fifteen years. Despite the violent nature of his crime, Williams was placed on parole in December 1984 after a mere three years in prison. With credit for his good time, Williams' parole was to expire in October 1990.

In 1983, while Williams was still in prison in South Dakota, the state added a provision to its parole laws stating that, if

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[1]The Honorable John B. Jones, United States District Judge for the District of South Dakota.

a parolee violates the terms of his parole, the South Dakota Board of Pardons and Paroles (the Board) is "authorized to order the reduction of time in full or in part [that was granted] for good conduct." S.D.Codified Laws Ann. § 24-15-24 (1988). In the parole agreement Williams signed in connection with his release to parole status, he acknowledged he was aware that, were he to violate his parole, he could lose all of his good-time credits. In 1986, the state again added a provision to its laws, this time to provide that, "[u]pon issuance of [an arrest] warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation." Id. § 24-15-21 (Supp. 1994).

After being placed on parole, Williams went to South Carolina, where in August 1987 he was convicted of writing a fraudulent check. For this crime South Carolina placed

Williams on probation for one year and ordered him to make restitution. Back in South Dakota, the Board issued an arrest warrant for Williams when it learned in February 1988 of his fraudulent check conviction.

By the time of the Board issued the arrest warrant, however, Williams was in jail once again, having been taken into custody in December 1987. The place again was South Carolina, the charge, this time, first-degree murder. In May 1988, Williams was convicted of the first-degree murder of Zenaida Albury. Williams's murder conviction, was reversed in January 1991, however, and his case was remanded for a new trial. State v. Williams, 303 S.C. 274, 400 S.E.2d 131 (1991).

When South Dakota learned the next month, in February 1991, that Williams again was awaiting trial, it informed South Carolina that it had issued a warrant for Williams's arrest. When Williams posted bond in South

Carolina, authorities there detained him pursuant to the South Dakota warrant and returned him to that state in April 1991, six months after Williams's parole originally was to have expired.

Later that April the Board held a parole revocation hearing. Williams admitted at the hearing that he had been convicted of passing a fraudulent check. The Board concluded that Williams had violated the terms of his parole, and it revoked the parole and Williams's six years of good-time credit. Williams's new release date was to be in October 1996, upon the completion of his fifteen-year sentence on his South Dakota rape conviction.

Williams challenged the Board's actions in state court, claiming that the Board's application to him of the 1983 and 1986 statutory modifications each worked a violation of the Ex Post Facto Clause of the United States Constitution. U.S. Const. art.

I, § 10, cl. 1. The state argued that Williams had notice that he could lose his good-time credits if he violated the terms of his parole, and that Williams's loss of his good-time credits, and the resulting extension of his sentence, were direct consequences of his parole violation and thus were based on conduct that occurred after the change to the state law was made. A similar argument was made by the state with respect to the 1986 tolling provision. The South Dakota Supreme Court ultimately agreed with the state's position and upheld the Board's actions. In re Williams, 488 N.W.2d 667 (S.D. 1992).

Williams then filed his petition in the District Court for a writ of habeas corpus, raising the same ex post facto challenges. The court concluded that the application of each statutory provision to Williams violated the ex post facto prohibition and granted Williams's petition. The state appeals.

II.

[1,2] A state violates the Ex Post Facto Clause of the federal constitution if it attempts to punish as a crime an act that was not criminal when done, removes a defense available when the act was committed, or increases the punishment for a crime after it was committed. Collins v. Youngblood, 497 U.S. 37, 42-43, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990). For a law to run afoul of this ban, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981) (footnote omitted).

In Greenfield v. Scafati, 277 F.Supp. 644 (D.Mass. 1967) (three-judge court), aff'd mem., 390 U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968), the court considered whether a state violated the ex post facto ban when it

applied to a prisoner a law passed after the prisoner had been incarcerated but before he had been paroled. The law at issue stated that, upon revocation of a prisoner's parole, the prisoner was not eligible to accumulate good-time credits during the first six months of his reincarceration. The court held the law to be ex post facto, reasoning that the law applied to the punishment that had been imposed on the prisoner as a result of his initial offense, and thus was retroactive, and that the law disadvantaged him because it operated to increase the time he ultimately would be required to spend in prison. The opinion of the three-judge district court was affirmed summarily by the Supreme Court.

The Fifth Circuit applied Greenfield's principles in Beebe v. Phelps, 650 F.2d 774 (5th Cir. Unit A July 1981) (per curiam), a case that presented facts virtually identical to those of the case before us--the law at

issue, which had been enacted after the prisoner's conviction but before his parole, provided that he would forfeit a portion of his good-time credits were his parole revoked. The court held that the application of the law worked an ex post facto violation when applied to the prisoner because the offense for which the prisoner's parole had been revoked carried its own sentence, while the good-time forfeiture extended the time remaining to be served on the prisoner's original sentence. Other federal courts uniformly have followed Greenfield. See, e.g., United States v. Paskow, 11 F.3d 873 (9th Cir. 1993); Fender v. Thompson, 883 F.2d 303 (4th Cit. 1989).

As existing Supreme Court precedent, Greenfield dictates the result we reach today. Were it not for the 1983 statutory change allowing the Board to revoke Williams's good-time credits, Williams's sentence would have expired in October 1990. By operation of the

law at issue here, Williams would be required to remain in prison until October 1996. Because the law Williams challenges increases his punishment, it is being applied to his detriment.[2] It also is being applied retroactively, because the law extends the term Williams must serve on his South Dakota rape conviction, and does not constitute a punishment for his South Carolina fraudulent check offense (South Carolina already has punished Williams for that offense).

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[2]The state argues that, even before the 1983 statutory change, the Board was authorized to revoke a prisoner's good-time credits if the prisoner committed a parole violation. Therefore, it concludes, the statutory change cannot have disadvantaged Williams. See Burnside v. White, 760 F.2d 217 (8th Cir.), cert. denied, 474 U.S. 1022, 106 S.Ct. 576, 88 L.Ed.2d 559 (1985). It is uncontroverted, however, that at the time Williams committed the offense of conviction the Board lacked explicit statutory authority to revoke good-time credits, see In re Williams, 488 N.W.2d 667, 670 (S.D. 1992), and the state has not made a persuasive showing that the Board otherwise had such authority at that time.

The state contends that Greenfield no longer is good law in light of Weaver, and that we should hold that the application of the 1983 revocation law to Williams was not ex post facto because Williams was on notice of the change and it was his actions after the enactment of the 1983 law that led to the revocation of his good-time credits. In Weaver, the Supreme Court invalidated as ex post facto Florida's change in its method for calculating good-time credits for all of its prisoners, a change that reduced the amount of good-time credits prisoners would receive. As the state points out, the Weaver Court explained that, "[c]ritical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint." Weaver, 450 U.S. at 30, 101 S.Ct. at 965. Because the Weaver Court expressed concern about the prisoners' lack of notice, a

concern not mentioned in Greenfield, the state concludes that adherence to Greenfield is not justified here, where Williams knew that if he violated the terms of his parole he could lose his good-time credits. We cannot agree.

First and foremost, in Weaver the Supreme Court held that Greenfield still is controlling authority. The majority opinion in Weaver discussed Greenfield and cited that case with approval. Id. at 34, 101 S.Ct. at 966. And in his opinion concurring in the judgment, Justice Blackmun, joined by Chief Justice Burger, explained that he joined the judgment of the Court only because he felt bound to do so by Greenfield and Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937). Weaver, 450 U.S. at 37, 101 S.Ct. at 968 (Blackmun, J., concurring in the judgment).

[3] Second, the passage from Weaver quoted above actually is quite different when

quoted in full: "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." Id. at 30, 101 S.Ct. at 965 (emphasis added). Thus, notice is relevant when the prisoner commits his criminal acts, not when he is paroled. In addition, although the Weaver Court discussed the importance of notice, of which the plaintiff-prisoners in that case had had none, the decision in Weaver was based not on the notice issue, but on the statute's retroactive application to the disadvantage of the prisoners. Id. at 31-34, 101 S.Ct. at 965-66.

Finally, the notice argument does not apply in the Greenfield line of cases in the same manner as it did in Weaver, for in the former cases the parolees were on at least

constructive notice as to the new consequences of a post-conviction violation, whereas in the latter case all prisoners--even if they did not commit a subsequent bad act--were affected by the new law. Other federal courts faced with Greenfield-type situations also have refused to accept the notice argument the state makes here. See, e.g., Paskow, 11 F.3d at 880 (noting that, to adopt the "notice" argument, a court "would be required to jettison twenty-five years of precedent"); Fender, 883 F.2d at 307 (holding that notice is irrelevant where "the challenged statute nevertheless accomplished an impermissible enhancement of the punishment for an earlier, unrelated crime"); Beebe, 650 F.2d at 776 (rejecting the argument that, because the prisoner had notice that he would forfeit a portion of his good time if his parole was revoked, the law was not ex post facto).

Based on Greenfield and its progeny, we

are constrained to hold that South Dakota's application to Williams of the good-time forfeiture provision violates the Ex Post Facto Clause. Having determined that the state could not constitutionally revoke Williams's good-time credits, we conclude that, regardless of whether the tolling provision was ex post facto as applied to Williams (an issue we need not and do not reach), Williams's sentence has expired.[3] Accordingly, Williams is entitled to a writ of habeas corpus.[4]

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[3]When the state issued Williams's arrest warrant in February 1988, Williams had 32 months remaining on his sentence (which was to expire in October 1990). Since April 1991, when the state re-incarcerated Williams after revoking his parole and good-time credits, more than 32 months have passed. Therefore, even assuming the tolling provision is valid as applied to Williams, he has served the time remaining on his sentence.

[4]Williams also argues that his parole had expired by the time the Board attempted to revoke it, and thus in revoking his parole the Board deprived him of his rights under the

(continued...)

III.

The judgment of the District Court granting Williams's petition for a writ of habeas corpus is affirmed. Subject to the resolution of any detainers that may be pending against Williams, he is to be released from the custody of the state of South Dakota.

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[4](...continued)
Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments. Our resolution of this case makes it unnecessary for us to reach these arguments.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

WILLIE WILLIAMS, III,	*	CIV. 92-4159
	*	
Petitioner,	*	
	*	
v.	*	
	*	
WALTER LEAPLEY, Warden, South Dakota State Penitentiary, and MARK W. BARNETT, Attorney General, State of South Dakota,	*	
	*	
Respondents.	*	

APPEARANCES:

For the Plaintiff. Mr. Douglas E. Hoffman
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For the Defendant. Mr. David O. Carter
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MEMORANDUM OPINION AND ORDER

Petitioner, Willie Williams, who is currently confined at the South Dakota State

Penitentiary, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. A hearing was held on May 24, 1993 to consider two pending motions: (1) Petitioner's Motion to Amend his Petition, and (2) Petitioner's Motion for Summary Judgment. The Court granted the first motion and took the second motion under advisement. After consideration of the record, briefs and arguments of counsel, the Court concludes that Petitioner is entitled to the relief sought. Accordingly, his Motion for Summary Judgment shall be granted.

Background

This case arises from Petitioner's parole revocation. Petitioner claims that the revocation, and his subsequent loss of good time credit, violates the Constitution's prohibition of ex post facto laws.

The facts of this case are set out in detail in In re Williams, 488 N.W.2d 667 (S.D.

1992). The following chronology emphasizes dates which are relevant to Petitioner's claims.

1. Williams was convicted of rape in South Dakota in 1981.
2. The South Dakota Legislature amended SDCL 24-15-24 in 1983 to provide that if the Board of Pardons and Paroles determined a parole violation had occurred, "the board is authorized to order the reduction of time in full or in part for good conduct granted under § 24-5-1."
3. Williams was paroled in December 1984.
4. The South Dakota Legislature amended SDCL 24-15-21 in 1986 to provide that the issuance of a warrant suspends the running of parole supervision time.
5. Williams was convicted of

"fraudulent checks" in South Carolina on August 21, 1987.

6. The South Dakota Board of Pardons and Paroles (Board) issued a warrant for Williams' arrest for alleged parole violations stemming from the "fraudulent check" conviction on February 2, 1988.

7. Unless the running of Williams sentence was tolled by the issuance of the 1988 warrant, under the "good conduct" provisions of SDCL 24-5-1, Williams sentence for the 1981 rape conviction was fully satisfied on October 14, 1990.

8. Williams was convicted of murder in South Carolina, and his conviction was reversed by the Supreme Court of South Carolina on January 7, 1991. State v. Williams, 303 S.C. 274, 400 S.E.2d 131.

9. Williams was returned to South Dakota in early April 1991.

10. The Board held a hearing and entered an order revoking Williams' parole on April 26, 1991 based on the 1987 "fraudulent check" conviction, and simultaneously revoked all six years of William's good time credits.

Petitioner contends that application of the 1986 version of SDCL § 24-15-21 to him, which served to toll his sentence upon the issuance of the arrest warrant, violates the ex post facto prohibition of the Constitution. He also argues that the Board lacked authority to revoke his good time credits absent the 1983 amendment of SDCL § 24-15-24, which expressly granted such authority, and that application of that amendment similarly violates the ex post facto clause. If Petitioner prevails on either claim, he is entitled to habeas corpus relief.

Discussion

The ex post facto prohibition[5] forbids Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." Cummings v. Missouri, 4 Wall. 277, 325-26, 71 U.S. 277, 325-26 (1867). "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29 (1981); Burnside v. White, 760 F.2d 217 (8th Cir.), cert. denied, 474 U.S. 1022 (1985). The ban also restricts governmental power by restraining arbitrary

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[5]Article I of the United States Constitution provides that neither Congress nor any State shall pass any : "ex post facto Law." See Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.

and potentially vindictive legislation. Weaver, 450 U.S. at 29; Burnside, 760 F.2d at 220.

Two elements must be present for a criminal or penal law to be ex post facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver, 450 U.S. at 28-29.

I. Tolling of sentence upon issuance of warrant

SDCL § 24-15-21 currently provides, in part, that: "Upon the issuance of [a] warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation." The language was not added, however, until 1986; five years after Williams was convicted and two years after he was paroled.

Williams argues that the statute was

being applied to either his 1981 conviction or his 1984 parole. The South Dakota Supreme Court rejected Williams' argument. If found that the 1986 statute was applied to his 1987 parole violation:

> SDCL 24-15-21, including the provision regarding the suspension of parole supervision time, was enacted and in effect before Williams was convicted of passing fraudulent checks in South Carolina. Thus the 1986 statute was not being applied to conduct which occurred before its enactment.

In re Williams, 488 N.W.2d at 670. Accordingly, the court determined that there was no ex post facto violation because there was no retrospective application. Id. at 670.

The United States Supreme Court considered and rejected a similar argument in Weaver v. Graham, 450 U.S. at 31. The respondent in Weaver maintained that Florida's

1978 law altering the availability of gain time[6] was not retrospective because, on its face, it applied only after its effective date. The Court rejected the argument on the ground that it elevated form over substance:

> The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast by asking whether [the statute] applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative.... Thus, the provision attaches legal consequences to a crime committed before the law took effect."

Id. (citations omitted) (emphasis added).

The respondent also argued that Florida's revised gain-time provision was not retrospective because its predecessor was "no part of the original sentence and thus no part of the punishment annexed to the crime at the

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[6]Gain time is sometimes referred to as "good time." It refers to various kinds of time credited to reduce a prisoner's prison term for good conduct and obedience to prison rules. See generally SDCL § 24-5-1.

time petitioner was sentenced." Id. The Court also rejected this argument, finding that it was foreclosed by precedent. Id. at 32.

Although Weaver involved the computation of gain time, its principles are equally applicable in this case. Here, the conviction for which Williams was paroled occurred five years prior to the amendment of SDCL § 24-15-21. Clearly application of the tolling statute to Williams was retrospective.

It is equally clear that Williams was prejudiced as a result of the application of the 1986 statute to him. Had it not been for the tolling statute, his sentence would have been fully satisfied on October 14, 1990. Accordingly, I conclude that he is entitled to the relief sought. I shall nonetheless address the merits of the second issue raised by Petitioner because it, too, is a case of first impression for this Court.

II. **Revocation of Petitioner's Good Time Credits**

When Williams was convicted and sentenced the Board had no explicit statutory authority to reduce a parolee's good time credits because of a parole violation. In 1983, SDCL § 24-15-24 was amended to provide that if the Board determined a parole violation had occurred, "the board is authorized to order the reduction of time in full or in part for good conduct granted under § 24-5-1." Williams was paroled a year later. Upon his violation of parole and return to prison the statute was invoked. Williams argues that application of the statute was ex post facto. The Court agrees.

The facts in this case are analogous to Greenfield v. Scafati, 277 F.Supp. 644 (D. Mass. 1967) (three-judge court), aff'd, 390 U.S. 713 (1968). Scafati involved a Massachusetts statute which forbid prisoners

from earning good conduct deductions for the first six months after re-incarceration following violation of following of parole. The statute was passed after petitioner was sentenced but before he was paroled. The statute was invoked upon petitioner's violation of parole and subsequent return to prison.

The Scafati Court held that application of the statute to petitioner violated the constitutional prohibition against ex post facto laws. The three-judge panel was affirmed on appeal to the United States Supreme Court and the decision was cited by the Court in Weaver, 450 U.S. at 32. See also Story v. Collins, 920 F.2d 1247 (5th Cir. 1991) (if state computes good conduct time on basis of law that became effective after offense that resulted in prisoner's incarceration, and if computation is less favorable to the prisoner than computation he

would have received under law in effect on date he committed offense, the state violates the constitutional provision against ex post facto laws.); Parton v. Armontrout, 895 F.2d 1214 (8th Cir.), cert. denied, 498 U.S. 879 (1990) (application of current Missouri parole statute to inmate who was convicted of statutory rape in 1972, and required him to complete Missouri sex offender program before he could be eligible for parole violated ex post facto clause of Constitution); Raske v. Martinez, 876 F.2d 1496 (11th Cir.), cert. denied, 493 U.S. 993 (1989) (Florida statute that allowed prisoners to earn only 20 days per month of incentive gain-time constituted unconstitutional ex post facto law as applied to Florida inmate who was convicted of offenses that occurred prior to statute's passage); Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) (statutes enacted or amended after prisoner was sentenced cannot be applied

to alter conditions of or revoke his pre-existing parole eligibility notwithstanding that conduct purportedly triggering application of statute occurred after its enactment).

Because Scafati is clearly controlling, I conclude that Petitioner is entitled to habeas corpus relief on this issue as well. Granting Petitioner habeas relief would ordinarily result in his release, but it appears in related litigation in this Court, Williams v. DeLano, CIV 93-4121 (D.S.D.), that South Carolina has filed a detainer seeking to return him to South Carolina for retrial of the murder conviction.

Therefore, upon the record herein,

IT IS ORDERED:

(1) That Petitioner's Motion to Amend his Petition, Doc. 16, is granted.

(2) That Petitioner's Motion for Summary Judgment, Doc. 20, is granted.

(3) That Petitioner's Petition for a Writ of Habeas Corpus, Doc. 1, is granted.

(4) That petitioner be released from custody on his South Dakota conviction after resolution of any detainers now pending against him.

Dated this 23rd day of July, 1993.

BY THE COURT.

/s/ John B. Jones
Chief Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK
By /s/ Linda M. Ziegler
DEPUTY

APPENDIX C

IN THE MATTER OF THE REVOCATION OF THE PAROLE OF WILLIE WILLIAMS III.

NO. 17719.

Supreme Court of South Dakota.

Considered on Briefs March 19, 1992.

Decided July 1, 1992.

Rehearing Denied July 27, 1992.

MILLER, Chief Justice.

Willie Williams III (Williams) appeals a circuit court judgment affirming an order of the Board of Pardons and Paroles revoking his parole. We affirm the circuit court judgment.

FACTS

Williams was charged with first degree rape in October 1981. He was arrested and placed in jail on October 14, 1981. Williams was convicted of first degree rape in December 1981 and was sentenced to fifteen years in the state penitentiary.

SDCL 24-5-1 provides that inmates are

entitled to deduct specified amounts of time for each year of "good conduct." Up to six years of time could be deducted from Williams' sentence if he maintained "good conduct" while serving his sentence. Consequently, Williams' tentative "good conduct" release date was October 14, 1990.

On December 21, 1984, Williams was paroled from the 1981 rape sentence. Williams signed the standard parole "Agreement" which provided, in part: "In the event I am returned to the institution, and my parole is revoked, I understand that I may lose any or all of my Good Time." Under his parole agreement, Williams was allowed to move back to his home state of South Carolina.

On August 21, 1987, Williams was indicted and convicted of "Fraudulent Checks" in South Carolina. He was sentenced to one year in prison but the sentence was suspended. On February 2, 1988, the South Dakota Board of

Pardons and Paroles (hereinafter "the Board") was informed of the South Carolina conviction and issued a warrant for the arrest of Williams. No parole revocation hearing was held at that time.

Meanwhile, in May 1988, Williams was charged with murder in South Carolina. He was again taken into custody by South Carolina officials and was tried and convicted of murder. Williams remained incarcerated in South Carolina during his appeal of the murder conviction. The murder conviction was reversed and remanded on January 7, 1991. Williams was held in custody pending retrial.

On February 26, 1991, the South Dakota State Penitentiary sent a computer message to the Charleston County Jail informing them that the Board had issued a warrant for the arrest of Williams. The message specifically stated "THIS IS A "NO BOND" SITUATION! ! ! !"

Williams was entitled to post bond in

South Carolina pending his retrial on the murder charge. When Williams posted the requisite bond in South Carolina he was detained under the South Dakota warrant. Williams was returned to South Dakota on April 3, 1991.

Back in South Dakota, Williams was given notice that a parole revocation hearing would be held on April 26, 1991. During that parole revocation hearing, in response to direct questioning by the Board, Williams admitted that he had been convicted of "fraudulent checks" in South Carolina in 1987. The Board found that Williams had violated the terms of his parole and entered an order revoking Williams' parole with the loss of six years good time credits.

Williams appealed the order revoking parole to the circuit court. The circuit court affirmed the decision of the Board. Williams appeals to this Court.

DECISION

The following chronology emphasizes the important dates which are relevant to this appeal.

1. Williams was convicted of rape in South Dakota in 1981.

2. Williams was paroled in December 1984.

3. Williams was convicted of "fraudulent checks" in South Carolina on August 21, 1987.

4. On February 2, 1988, the Board of Pardons and Paroles issued a warrant for Williams' arrest for alleged parole violations.

5. Unless the running of Williams sentence was tolled by the issuance of the 1988 warrant, under the "good conduct" provisions of the South Dakota statutes, Williams' sentence for the 1981 rape conviction was fully satisfied on October 14, 1990.

6. Williams was arrested in South Carolina under the 1988 warrant and was returned to South Dakota in early April 1991.

7. The Board of Pardons and Paroles held a hearing and entered an order revoking parole on April 26, 1991 based on the 1987 "fraudulent check" conviction.

WHETHER THE ISSUANCE OF AN ARREST WARRANT FOR AN ALLEGED PAROLE VIOLATION SUSPENDED THE RUNNING OF WILLIAMS' PAROLE SUPERVISION TIME.

Williams argues that the Board had no authority to revoke his parole because he maintains his sentence had already been fully served. The Board contends that their February 2, 1988 warrant suspended the running of his parole supervision time. They rely on SDCL 24-15-21 which currently provides:

> If the executive director of the board is satisfied that any provision of § 24-15-20 has been violated, the executive director may issue a warrant to the department of corrections, any law enforcement officer, or any parole agent, directing that the parolee named be arrested. Pursuant to the provisions of § 24-15-23 the parolee may be returned to the state penitentiary. Upon the issuance of the warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation. The board shall credit the inmate with time spent in custody as a direct result of the parole violation. (emphasis added).

Thus, the statute currently in effect clearly specifies that the issuance of a

warrant suspended the running of parole supervision time. Williams' case presents a special problem because that provision in the current version of SDCL 24-15-21 was not enacted until 1986, five years after Williams was convicted and two years after he was paroled. The version of the statute in effect when Williams was convicted and paroled did not contain the sentence which suspends the running of parole supervision time upon the issuance of a parole violation arrest warrant.

[1] Williams argues that the application of that 1986 version of the statute to him is a violation of the ex post facto prohibitions in the United States Constitution. Two elements must be present for a criminal or penal law to be considered ex post facto. Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17, 23 (1981)"[I]t must be retrospective, that is, it must apply to events occurring before its enactment, and it

must disadvantage the offender affected by it." Id. (footnote omitted).

[2] In this case SDCL 24-15-21 was not being applied retrospectively. Williams argues that the 1986 statute was being applied to his 1981 conviction or his 1984 parole. In reality, the 1986 statute was applied to his 1987 parole violation. SDCL 24-15-21, including the provision regarding the suspension of parole supervision time, was enacted and in effect before Williams was convicted of passing fraudulent checks in South Carolina. Thus the 1986 statute was not being applied to conduct which occurred before its enactment. There was no retrospective application and accordingly there is no valid ex post facto objection.

The issuance of the warrant in 1988 suspended the running of Williams' parole supervision time. The Board had authority to revoke Williams' parole.

WHETHER THE BOARD OF PARDONS AND PAROLES HAD AUTHORITY TO REDUCE WILLIAMS' GOOD TIME CREDITS.

[3] When Williams was convicted and sentenced the Board of Pardons and Paroles had no explicit statutory authority to reduce a parolee's good time credits because a parole violation. In 1983, SDCL 24-15-24 was amended to provide that if the Board determined a parole violation had occurred, "the board is authorized to order the reduction of time in full or in part for good conduct granted under § 24-5-1."

Williams was paroled in 1984. As a condition of his parole he signed a parole agreement in which he acknowledged that if he violated parole his good time credits could be revoked. Williams was found to have violated his parole and all six years of his good time credit were revoked. Williams argues that the Board had no authority to revoke his good time

credits absent the 1983 amendment of the statute. He argues that application of the statute was ex post facto.

The 1983 statute authorized the Board to reduce an inmate's good time credits for parole violations. This 1983 statute was enacted and in effect when Williams was paroled in 1984. Moreover, Williams agreed in 1984 that the Board of Pardons and Paroles could revoke his good time credit if he violated parole. Again, there was no retrospective application of the 1983 statute.

We affirm the decision of the circuit court.

WUEST and SABERS, JJ., concur.

HENDERSON and AMUNDSON, JJ., dissent.

HENDERSON, Justice (dissenting).

Though freedom is at stake, this is an administrative appeal under SDCL Ch. 1-26. It emanates from a final Order of the State Board of Pardons and Paroles. By the Order,

affirmed by the trial court, Willie Williams, III, a black man, imprisoned in the South Dakota State Penitentiary, is further incarcerated; this man's parole was purportedly revoked with this result: He loses 6 years "good time credits," which he deserved, under SDCL 24-15-24.

Essentially, two issues are framed under the facts of this case and fully briefed before us:

1. Did the revocation of Williams' parole, 6 months after the expiration of his sentence, violate his constitutional and statutory rights?
2. Applying SDCL 24-15-24, did the Parole Board unconstitutionally violate Williams' "good time" credits by the unconstitutional violation of an ex-post facto law?

SDCL 24-15-24, as amended, was enacted after the commission of the crime for which Williams was convicted. Ch. 201, 1983 S.D. Sess. Laws. This decision wrongfully approves of the board's action and the trial court's

decision. One, Williams' punishment is increased, which should not be because this statute is ex-post facto as applied to his case. Two, the Parole Board's order was entered over 6 months after his sentence expired; thus, the Board's action to re-incarcerate Williams was without legal authority. There is no evidence in the record to establish that Williams did not serve his time under the definition of "good conduct." Williams was first incarcerated on October 14, 1981. His "good conduct" release was, therefore, October 14, 1990.

SDCL 24-5-2 is important to our consideration. It provides:

> Whenever any inmate has been discharged under the provision of § 24-5-1 [good time conduct], he shall at the time of his discharge be considered as restored to the full rights of citizenship. At the time of the discharge of any inmate under the provisions of his chapter, he shall receive from the secretary or corrections a certificate stating that he has been restored to the full rights of a citizen. <u>If an inmate is on parole at</u>

> the time he becomes eligible for discharge the secretary of corrections shall issue a like certificate, which shall be due notice that such inmate has been restored to the full rights of a citizen. (emphasis supplied mine).

A hearing was held by the Board of Pardons and Paroles based on the 1987 "fraudulent check" conviction. This hearing took place on April 24, 1991. However, two days before this hearing, this Board found that Williams violated the terms of his parole. This, in itself, should prove fatal to the Board's case. Later, the Board said this was a "typographical error." Williams, under my thesis, still wins this appeal assuming there was a "typographical error." For, the South Carolina Court entered an order on April 16, 1991, which specifically provided:

> IT IS ORDERED that all records relating to such arrest and subsequent discharge pursuant to the above referenced section be dismissed, expunged and immediately destroyed and that not evidence of

> such records pertaining to such charge shall be retained by any municipal, county or state agency.

Williams' record of the 1987 "fraudulent check" charge does not exist. So how can the Parole Board build a revocation--and a reincarceration--on a crime that does not exist? It appears that the only evidentiary discourse, at the parole revocation hearing, came from Williams, who told the Board that the IRS seized his bank accounts because he was involved in a partnership in South Carolina. Therefore, he told the Board, his checks bounced. The fraudulent check charges resulted from this seizure; the South Carolina court set aside the conviction, in its entirety, and the Board should have recognized the South Carolina order. It did not. Although in good faith, the Board acted improvidently.

Enter the murder charge: Williams was charged with murder, convicted of murder,

incarcerated for murder, but the murder conviction was reversed. Said reversal was entered on or about the 7th day of January, 1991. On February 26, 1991, notwithstanding the above, the State Penitentiary sent a computer message to the Charleston County Jail imploring the South Carolina authorities to hold Williams and expressed, with gusto, that this was a "no bond situation."

Examining the dates, it appears the Board of Pardons and Paroles revoked Williams' parole based upon a conviction which did not exist. Pointedly, the fraudulent conviction ceased to exist on April 16, 1991, and the Board revoked the parole on April 26, 1991 (under the "typographical error" theory). Thus, a miscarriage of justice exists. There can be doubt, at least in the mind of this writer, that such an error constitutes plain error and a reversal of the Board and the trial court is now mandated. SDCL 23A-44-15

provides:

> Plain errors or defects affecting substantial rights may be noticed although there were not brought to the attention of a court.

See also, State v. Lewandowski, 463 N.W.2d 341 (S.D. 1990) and State v. Brammer, 304 N.W.2d 111 (S.D. 1981).

For benefit of the reader, the salient facts are:

1. Williams was convicted of Rape in South Dakota in 1981.

2. Williams was paroled in December 1984.

3. Williams was convicted of "fraudulent checks" in South Carolina on August 21, 1987.

4. The Board of Pardons and Paroles issued a warrant for Williams' arrest for alleged parole violations on February 2, 1988.

5. Under the "good conduct" provisions of the South Dakota statutes, Williams' sentence for the 1981 rape conviction was fully satisfied on October 14, 1990.

6. In late February or early March 1991, Williams was arrested in South Carolina under the 1988 warrant. Williams was returned to South Dakota in early April 1991.

7. On April 16, 1991, a South Carolina court expunged Williams' record of the 1987 "fraudulent check" conviction.

8. The Board of Pardons and Paroles held a hearing on whether to revoke parole and entered an order revoking parole on April 26, 1991 based on the 1987 "fraudulent check" conviction.

Under the applicable law, and the circumstances of this case, the issuance of an arrest warrant for an alleged parole violation did not toll the running of Williams' parole supervision time.

Per SDCL 24-5-2, if the running of Williams' sentence was not tolled for some reason, Williams' sentence was fully served on October 14, 1990. If a sentence is fully served, the Board of Pardons and Paroles no longer has authority to incarcerate a convict, nor may they revoke his parole or take away any good time credit. See generally, 59 Am.Jur.2d Pardons & Paroles § 113. This is not disputed by the Board of Pardons and Paroles. But the ultimate quest in law does

not end there.

Board of Pardons and Paroles contends, when they issued the February 2, 1988 warrant for Williams' arrest, the running of his sentence was tolled. They rely on SDCL 24-15-21. SDCL 24-15-21 currently provides:

> If the executive director of the board is satisfied that any provision of § 24-15-20 has been violated, the executive director may issue a warrant to the warden of the penitentiary, any law enforcement officer, or any parole agent, directing that the parolee named be arrested and returned to the state penitentiary under the terms of his original conviction and sentence pending a hearing on the alleged violations. Upon the issuance of the warrant, the running of the parole supervision time shall be suspended until the board has entered its final order on the revocation. The board shall credit the inmate with time spent in custody as a direct result of the parole violation (emphasis supplied mine).

A problem arises because that version of SDCL 24-15-21 was not enacted until 1986, five years after Williams was convicted and two years after he was paroled. The version of the statute in effect when Williams was

convicted and paroled did not contain that very important sentence which would operate to automatically toll the running of a parolee's sentence if a warrant was issued for his arrest. Resultantly, the states in effect at the time of Williams' conviction and parole was insufficient in this regard. To correct that insufficiency, the State Legislature amended SDCL 24-15-21 in 1986 by adding the sentence emphasized above.

Williams argues that the application of that 1986 version of the statute to him is a violation of the ex post facto prohibitions in the United States Constitution.

The United States Supreme Court has stated that the United States Constitution's two provisions regarding ex post facto laws prohibit the federal and state legislatures from enacting any law, "which imposes a punishment for an act which is not punishable at the time it was committed; or imposes

additional punishment to that then prescribed." Weaver v. Graham, 450 U.S. 24, 28 101 S.Ct. 960, 963, 67 L.Ed.2d 17, 22 (1981) (emphasis added) citing Cummings v. Missouri, 71 U.S. (4 Wall) 277, 18 L.Ed. 356 (1867). Therein, Williams now impaled, should be extracted from the minions of the law.

Supreme Court cases of older vintage list general categories of statutes which constitute ex post facto laws. However, in recent cases the Supreme Court has applied a more straightforward analysis when faced with ex post facto claims.

> Our decisions prescribe that two critical elements must be present for a criminal or penal law tc be ex post facto; it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affect by it.

Weaver, 450 U.S. at 29, 101 S.Ct. at 964, 67 L.Ed.2d at 23 (footnotes omitted).

When Williams was convicted and paroled the issuance of a warrant for parole violation

as ex post facto manner. I agree.

conferee if was inconsistently applied in retrospectively to his disadvantage. Thus, he will assume conferee that the law was applied retroactively to his detriment, Williams, parole was revoked. Thus, he is paid made to serve more time than he could have been made to serve it the prior sentence. Under the statute had been applied. would not have been made to serve it the Board of Pardons and Paroles applied the time credit. Rather, and wrongfully, the April 1991 or striped him of six very good behavior to 1991 on October 31, 1990. Consequently, the served on parole and would have been continued to run and would have been fully on parole and would have been continued to run and would have been vacated and paroled, his sentence sentence. Under the law it effect is the time a to paramount the had not automatically fall

Hence, the 1986 statute was applied in an ex post facto manner. Williams, sentence was not fully and therefore expired on October 14, 1990. On that date, the Board of Pardons and Paroles had no authority to revoke his parole. Accordingly, the circuit court should be reversed because the said Board acted outside of the rule of law.

When Williams was convicted and sentenced, the Board of Pardons and Paroles had no explicit statutory authority to revoke a parole, a good time credits for a parole violation. In 1983, SDCL 24-12-24 was amended to specifically provide that it the Board of Pardons and Paroles determined a parole violation had occurred, "...the board is authorized to order the reduction of time in full or in part for good conduct during such § 24-2-1."

Williams was paroled in 1984. As a condition of his parole, he signed a parole

agreement in which he acknowledged that it did have time credits parole was violated did poop time credits could be revoked.

True, Williams was found to have violated did poop time for six years to did poop time for six years of did poop time credits were revoked. Williams contends, however, that the Board of Pardons and Paroles had no authority to revoke did poop time credits gained the 1981 amendment of the credits. He argues that application of the statute was ex post facto. I agree.

Without the 1981 statute, the Board of Pardons and Paroles had no authority to take away poop time credits. Under the law in effect at the time Williams was convicted, the worst scenario for Williams was that he could have did parole revoked. When the 1981 statute was applied to him, Williams had did time credits revoked and had six years to poop time credits earned. Being entitled to did poop time credits, Williams has to serve six

extra wage continement that could not have been imposed without the 1861 statute. In my opinion, that is wrong. Williams, contention that the 1861 statute was applied in a retrospective manner, thus alleviating the prison from a lot more bond wages, is correct. It must be held to have been void ab initio and a wage bond time credits. I feel for Williams Williams, III, and hereby, in my limited way, I champion his legal cause, believing it is meritorious.

If might be argued, as a legal premise, that Williams agreed that the Board could take away his bond time credits it be violated prior. Where, however, under the state of record, as pertains to the alleged violations of parole, has Williams done so? Voluntarily chooses parole did not give the Board the right to act beyond the law which gave the Board the discretion and constitutional and right to revoke his

afforded civil rights. With this, my reflections are at end. I wish them well and say, in conclusion that this man is entitled to his freedom.

CAVEAT

"For whom the Bell Tolls,

It we want privateers to change, public officials forced privateers and exercise many other changes. We have some privateers must change. We have some community efforts placed there times in this country but with them exceptions it will and established and not will organized and them of the participants are will trained.

Delivery of Justice at 318.

collectively, we take on a moral burden and we but a person behind walls and

that pudgen is to give him or her a chance to change.

Delivery of Justice at 355.

MORE WAREHOUSES, OR FACTORIES WITH FENCES?

Reward and punishment permeate the lives of all free people and they should not be denied to prison inmates. Central to the American system is the idea that good performance is rewarded and poor performance is not.

Delivery of Justice at 345.

Willie Williams, performance in prison was good. He deserves his good time credits.

I am authorized to affix that Justice Department to the ex post facto law, and that he would reverse on that point.

JAMUNDSON joins this dissent on Issue II, "Lecture at University of Nebraska, Lincoln, Nebraska, December 16, 1981, by Chief Justice Warren E. Burger.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 93-3083SDSF	
MILLIE MILLIAMS, III,	*
	*
Appellee,	*
	*
v.	*
	*
STEVEN M. LEE, Warden,	*
South Dakota State	*
Penitentiary, and	*
MARK W. BARNETT,	*
Attorney General, State	*
of South Dakota,	*
	*
Appellants.	*

ORDER DENYING PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 20, 1994

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

FILED
FEB 16 1995

Docket No.94-1289

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

vs.

WILLIE WILLIAMS, III,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTION PRESENTED

WHETHER THE EX POST FACTO CLAUSE PROHIBITS REVOCATION OF AN INMATE'S GOOD TIME CREDITS AS PUNISHMENT FOR A PAROLE VIOLATION, UNDER STATUTORY AUTHORITY ENACTED IN 1983, WHICH WAS AFTER THE INMATE'S 1981 CRIMINAL CONVICTION, BUT WAS PRIOR TO HIS 1987 PAROLE VIOLATION?

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Docket No. 94-1289

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

vs.

WILLIE WILLIAMS, III,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The Respondent, Willie Williams, III, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Joe Class, Warden, South Dakota State Penitentiary, and Mark W. Barnett, Attorney General, State of South Dakota.

RELEVANT STATUTORY PROVISIONS

SDCL §24-5-1

> Every inmate sentenced for any term less than life..., subject to the provisions of §§24-2-17 and 24-2-18, is entitled to a deduction of four months from his sentence for each year and pro rata for any part of a year for the first year to the tenth, and six months for the tenth year and for each year thereafter until the expiration of the period of the sentence as pronounced by the Court, for good conduct.

SDCL §24-5-2

> Whenever any inmate has been discharged under the provisions of §24-5-1, he shall at the time of his discharge be considered as restored to the full rights of citizenship. At the time of the discharge of any inmate under the provisions of this chapter, he shall receive from the Secretary of Corrections a certificate stating that he has been restored to the full rights of a citizen. If an inmate is on parole at the time he becomes eligible for discharge, the Secretary of Corrections shall issue a like certificate, which shall be due notice that such inmate has been restored to the full rights of a citizen. ...

SDCL §24-15-13

> Parolees shall at all times be considered confined, in the legal custody of the warden of the penitentiary and shall remain under conviction for the crime for which they were convicted and sentenced.

SDCL §24-15-1.1

> Parole is the discretionary conditional release of an inmate from actual penitentiary custody before the expiration of his term of imprisonment. The prisoner remains an inmate under the legal custody of the Department of Charities and Corrections until the expiration of his term of imprisonment. ...

SDCL §24-2-17

The warden of the penitentiary shall keep a true record of the conduct of each convict, specifying therein each infraction of the rules of discipline. Each convict shall be notified of every entry on his record of each such infraction of the rules of discipline and shall have thirty days to challenge the validity of the entry or the disciplinary sanction imposed by notifying the warden thereof. After investigation, the warden may remove the entry or modify the imposed disciplinary sanction. Such record shall be used whenever the question of any convict's eligibility for parole or discharge shall arise under and by virtue of SDCL §24-5-1.

SDCL §24-2-18

The warden may, at any time prior to a convict's final discharge, consider recommendations of the Disciplinary Committee pertaining to the withholding of statutory time granted for good conduct and may recommend to the Board of Charities and Corrections that the reduction of time for good conduct under and by virtue of §24-5-1 be withheld in full or in part. The Board shall, after hearing, then fix the amount of time earned by good conduct to be withheld. The decision of the Board is final.

1978 South Dakota Session Law, Ch. 186 §30

The Executive Director of the Board of Pardons and Paroles may issue an Order to Show Cause why parole should not be revoked whenever he or the Board is satisfied that:

(1) a parolee is violating or has violated the regulations or restrictions that are placed upon him by the Board;

(2) a parolee has failed to report himself to the Office of Correctional Services;

(3) a parolee has failed to answer inquiries made by the Office of Correctional Services; or

(4) the purposes or objects of parole are not being served.

1978 South Dakota Session Law, Ch. 186 §31

> The Executive Director shall issue a warrant to the warden of the penitentiary, any law enforcement officer, or any parole agent of the Office of Correctional Services, directing that the parolee named be arrested and returned to the state penitentiary under the terms of his original conviction and sentence, pending a hearing on the alleged violations. ... [T]he parolee is to be returned to the penitentiary, there to be held for a hearing to be held before the Board of Pardons and Paroles to determine whether the parole should be revoked. ...If the Board is satisfied that any provision of Section 30 has been violated, it may revoke the parole and reinstate the terms of the original sentence and conviction.

1983 South Dakota Session Law, Ch. 201

> If the Board of Pardons and Paroles is satisfied that any provision of §24-15-20 has been violated, it may revoke the parole and reinstate the terms of the original sentence and conviction. In addition, the Board is authorized to order the reduction of time in full or in part for good conduct granted under §24-5-1. If the Board does not find that the provisions of §24-15-20 have been violated, it may restore the parolee to the original terms and conditions of his parole.

1986 South Dakota Session Law, Ch. 209

> If the Executive Director of the Board is satisfied that any provision of §24-15-20 has been violated, the Executive Director may issue a warrant to the warden of the penitentiary, any law enforcement officer, or parole agent of the Office of Correctional Services, directing that the parolee named be arrested and returned to the state penitentiary under the terms of his original conviction and sentence, pending a hearing on the alleged violations. Upon the issuance of the warrant, the running of the parole supervision time shall be suspended until the Board has entered its final order on the revocation. The Board shall credit the inmate with time spent in custody as a direct result of the parole violation.

STATEMENT OF THE CASE

The single question presented by the Petitioners is "whether the ex post facto clause prohibits revocation of an inmate's good time credits as punishment for a parole violation, under statutory authority enacted in 1983, which was after the inmate's 1981 criminal conviction, but was prior to his 1987 parole violation." A second issue was litigated before the District Court below, to-wit:

> Whether application of SDCL §24-15-21 to toll the running of Respondent's sentence upon the issuance of the parole violation warrant on February 2, 1988, constituted the unconstitutional application of an ex post facto law.

Respondent's good time release date was October 14, 1990. His parole revocation hearing occurred over six months later on April 26, 1991. The legislation providing that the issuance of a parole violation warrant would toll the running of parole supervision time was enacted in 1986, five years after Respondent's original conviction.

In granting the writ of habeas corpus, the District Court ruled in favor of Respondent, holding that application of the tolling provision was ex post facto. Because the sentence was fully served prior to the revocation of the good time credits, the revocation was ineffectual. Therefore, the District Court granted the Writ of Habeas Corpus and ordered that Respondent be released from the penitentiary.

In addition, the District Court ruled in Respondent's favor on the question presented before this Court. The change in South

Dakota statutory law which provided for revocation of good time credits as a sanction for a parole violation was enacted in 1983, again after Respondent's original conviction. The District Court held that application of this legislation to the Respondent was retrospective and prejudicial to Respondent. Consequently, the District Court ruled that Respondent was entitled to habeas relief on that issue as well.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's ruling that the good time credit statute, as applied to Respondent, was ex post facto. The Eighth Circuit found it unnecessary to reach the tolling statute issue and thus expressly declined to consider it. This Petition for Writ of Certiorari, therefore, only seeks review of the good time credit matter, as set forth by the Petitioners in their Question Presented. Respondent's arguments will thus be confined to that issue.

The Respondent, Willie Williams, III, was convicted of first degree rape in Pennington County, South Dakota, on December 10, 1981, and sentenced to fifteen years in the state penitentiary. Respondent's pre-trial detention began on October 14, 1981, and, therefore, with credit for time served, his "straight time" release date was October 14, 1996. As reflected in the South Dakota State Penitentiary Entrance Record and Date Calculation Review document, Respondent was granted six years good time credit pursuant to SDCL §24-5-1, advancing his release date to October 14, 1990. *See In re Revocation of the Parole of Willie Williams, III*, 488 N.W.2d 667, 669 (SD 1992).

Respondent was paroled on December 21, 1984, and subsequently returned to his home state of South Carolina, where he was supervised by local authorities pursuant to the Interstate Compact for Supervision of Parolees. He entered into business there and an IRS lien was imposed on the business. As a result of the lien, one of his business checks to Southern Bell Telephone did not clear the bank, resulting in Respondent's arrest on the charge of writing a fraudulent check. Respondent received a one year sentence, suspended, with probation and restitution in the amount of the check and 120 hours of public service.

On December 8, 1987, Respondent was arrested in Charleston County, South Carolina, on a charge of first degree murder relating to a homicide which allegedly occurred in March of 1986. He was taken into custody and held pending trial. A warrant for the arrest of Respondent for an alleged violation of parole, predicated upon the fraudulent check conviction, was issued by the South Dakota Board of Pardons and Paroles on February 2, 1988. However, no disposition of the warrant was attempted at that time. In May of 1988 Respondent stood trial in South Carolina and was convicted of the murder charge, and thereafter was sentenced to life imprisonment.

On January 7, 1991, Respondent's murder conviction was reversed by the South Carolina Supreme Court, and the case was remanded for a new trial. Respondent remained in custody, however, as a pretrial detainee. On February 26, 1991, South Dakota issued a detainer message to South Carolina relating to the February 2, 1988 arrest warrant. When, in March of 1991,

Respondent posted bond for release pending re-trial in South Carolina, he was detained pursuant to the warrant and returned to South Dakota. A parole revocation hearing was held in Sioux Falls, South Dakota, on April 26, 1991, after which the Board of Pardons and Paroles entered the following Order:

> [T]hat the parole heretofore granted by the Board of Pardons and Paroles to Willie Williams, III, on the 16th day of November, 1984, be hereby revoked with the loss of six (6) years good time; no dead time.

Pursuant to said Order, Respondent was remanded to the South Dakota State Penitentiary to be incarcerated there until October 14, 1996. Following unsuccessful appeals to the South Dakota Circuit Court and South Dakota Supreme Court, Respondent was released pursuant to the United States District Court's Writ of Habeas Corpus which was granted July 26, 1993 and affirmed by the United States Court of Appeals on August 31, 1994. Petitioners' suggestion for a rehearing en banc and Petition for rehearing by the panel were both denied by the Circuit Court on October 20, 1994.

SUMMARY OF ARGUMENT

Respondent's good time release date was October 14, 1990. Under South Dakota law, Respondent's sentence expired on that date unless the 1983 amendment to SDCL §24-15-24 (1983 South Dakota Session Law, Ch. 201), authorizing the parole board to revoke good time credits as a sanction for a parole violation, could be applied to him without violating the ex post facto clause. *In re Williams*, 488 N.W.2d 667, 669 (SD 1992). At the parole revocation hearing which was held on April 26, 1991, the parole board revoked

Respondent's parole with the loss of six years good time. But for the taking of those six years of good time credits, Respondent's sentence expired on October 14, 1990. SDCL §24-5-1; *In re Williams, supra*, at 669.

It is undisputed that at the time of Respondent's underlying conviction there was no provision under South Dakota law granting the Board of Pardons and Paroles or any other entity the authority to revoke a prisoner's statutorily granted good time credits as a sanction for a parole violation. *See In re Williams* at 670. Rather, good time credits could be revoked only within the strict confines of a statutory criteria set forth at SDCL §24-2-17 and §24-2-18. None of the predicates to the withholding of good time credits under those statutes ever occurred in Respondent's case.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the United States Supreme Court held that "any statute...which makes more burdensome the punishment for a crime after its commission...is prohibited as ex post facto." *Id.* at 42, quoting *Beazell v. Ohio*, 269 U.S.2d 167, 169-70 (1925). Indeed, this constitutional prohibition is addressed to laws, whatever their form, which increase punishment. *Id.* The issue before this Court is whether application of SDCL §24-15-24, as amended by 1983 Session Law Ch. 201, to Respondent works to increase his punishment for the crime of rape, for which he was convicted and sentenced on December 10, 1981. The answer to this question is clear. Absent application of the 1983 amendment, Respondent's sentence expired on October 14, 1990. If the statute is applied, six years of good time credits are revoked, extending his sentence to October 14, 1996.

The net result is that Respondent's punishment was increased by six years.

Given that, under the South Dakota statutes existing at the time of Respondent's conviction and sentence, the state had no authority to withhold Respondent's good time credits as a sanction for a parole violation, it follows that application of SDCL §24-15-24, as amended in 1983, to Respondent constitutes the unconstitutional application of an ex post facto law. *Weaver v. Graham*, 450 U.S. 24 (1981); *Greenfield v. Scafati*, 277 F.Supp. 644 (D. Mass. 1967), aff'd mem. 390 U.S. 713 (1968); *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993); *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989); *Yamamoto v. Parole Commission*, 794 F.2d 1294 (8th Cir. 1986); *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. 1981). All of the United States Courts of Appeals which have addressed analogous situations have ruled in accordance with the decision of the Eighth Circuit below, which is dictated by the precedent of this Court. There is no cognizable issue worthy of the Writ of Certiorari and the Petition therefore should be denied.

ARGUMENT

1. The Circuit Court Decision Below is Correct.

The United States Constitution at Article I, §10 states that "[n]o state shall...pass any...ex post facto law." The seminal case interpreting the federal ex post facto clause is *Weaver v. Graham*, 450 U.S. 24 (1981). The issue in *Weaver* was whether a Florida statute, enacted after the defendant's conviction and which reduced the availability of good time credits to inmates, was unconstitutional as an ex post facto law when applied to him.

450 U.S. at 25. Therein, the United States Supreme Court made clear that the ex post facto prohibition forbids states to enact any law which imposes "punishment more severe than the punishment assigned by the law when the act to be punished occurred." *Id.* at 28, 30. In *Weaver*, this Court set forth the following test for analyzing ex post facto claims:

> [T]wo critical elements must be present for a criminal or penal act to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

Id. at 29. The Court explicitly held that a law need not impair a vested right to violate the ex post facto clause. *Id.* Rather, critical to relief under the ex post facto clause is not an individual's right to less punishment, but lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was committed. *Id.* Thus, even if the statute merely alters penal provisions accorded by the grace of the legislature, it violates the clause if it is both retrospective and more onerous than the law in effect on the date of the offense. *Id.* at 30-31.

In the Petition for Writ of Certiorari, Petitioners embrace the holding of the South Dakota Supreme Court in this matter below to the effect that the 1983 amendment to SDCL §24-15-24 was not applied retrospectively to Respondent, based upon the following argument:

> The 1983 statute authorized the Board to reduce an inmate's good time credits for parole violations. This 1983 statute was enacted and in effect when Williams was

> paroled in 1984. ...[T]here was no retrospective application of the 1983 statute.

In re Williams 488 N.W.2d 667, 670 (SD 1992). The South Dakota Supreme Court did not cite any authority for this holding. Nor could it. The holding is clearly contradicted by controlling United States Supreme Court decisions. This was recognized by the District Court and the Circuit Court below in their well-reasoned decisions granting the writ.

Petitioners' interpretation of "retrospective" is refuted by the United States Supreme Court in *Weaver v. Graham*. In *Weaver*, the petitioner pleaded guilty to second degree murder on January 31, 1976. *Id.* at 450 U.S. 25. On January 1, 1979, the good time statute applicable when Weaver was convicted was amended to his disadvantage. The amended statute was applied to Weaver. The respondent in *Weaver* raised a form of the same argument stated by the South Dakota Supreme Court. That is, because Weaver's good time credits were calculated under the more restrictive law only after its enactment, and that good time credits were allotted for his time served prior to the amendment pursuant to the predecessor statutes, the law was not retrospective. This argument was rejected by this Court:

> The respondent maintains that Florida's 1978 law altering the availability of gain time is not retrospective because on its face, it applies only after its effective date.... This argument fails to acknowledge that it is the effect, not the form, of the law, that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts committed before its effective date. <u>In the context of this case, the question can be recast as whether [the 1979 statute] applies to</u>

> prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative. The respondent concedes that the state uses [the statute] which was implemented on January 1, 1979, to calculate the gain time available to petitioner, who is convicted of a crime occurring on January 31, 1976. Thus, the provision attached its legal consequences to a crime committed before the law took effect.

Id. at 450 U.S. 31 (emphasis added).

In essence, the *Weaver* court held that it was not material that the new good time statute was applied to only events which occurred after its enactment. Rather, the salient issue was that the statute was applied to a prisoner who was originally convicted prior to the statute's enactment.

The above holding was first articulated in *Greenfield v. Scafati*, 277 F.Supp. 644 (D. Mass. 1967) aff'd mem., 390 U.S. 713 (1978), where a statute enacted after the inmate's conviction provided for forfeiture of good time credits for violation of parole. 277 F.Supp. at 644-45. That is the precise issue raised by Petitioners herein. The inmate in *Greenfield* suffered forfeiture of good time credits because of a parole violation pursuant to a statute which was enacted after his original conviction, but prior to the date of his parole. 277 F.Supp. at 645.

The *Scafati* court held that, because there was no provision for revocation of good time credits for violation of parole at the time that the prisoner was convicted of his original sentence, application of the amendment to him was both detrimental and retrospective. 277 F.Supp. at 645-46. Petitioner had no "fair notice" of this element of the sentence at the time that he

committed the crime for which he was originally convicted. *Id.* Therefore, the statute was ex post facto as applied to him. This decision was affirmed on direct appeal to the United States Supreme Court by memorandum without written opinion. 390 U.S. at 713. The *Greenfield* decision was cited with approval by this Court in *Weaver v. Graham*. 450 U.S. at 34. Justice Blackman stated that the *Greenfield* decision was the controlling precedent that required his concurrence with the majority opinion in *Weaver*. *Id.* at 37, Blackman, J. concurring.

In an analogous case, the Fifth Circuit Court of Appeals in *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. 1981) reached the same result. *Beebe*, like *Greenfield*, involved the question of whether a statute enacted after the inmate's conviction, but prior to his parole, and which provided for forfeiture of good time credits for violation of parole, was ex post facto when applied to that inmate. 650 F.2d at 775. The *Beebe* court rejected an argument similar to the one raised by Petitioners herein:

> The crucial issue here, however, is not that petitioner had notice that he would forfeit his accrued good time if he violated parole, but that the forfeiture provision, which was passed after the commission of the [underlying offense], alters his punishment for that offense to his disadvantage. The forfeiture is not a punishment for the [offense which constituted the parole violation]. Rather, the forfeiture of good time is a sanction that extends the time remaining on petitioner's original sentence. The practical effect is a statutory increase in punishment for the first offense, enacted subsequent to the commission of the offense.
>
> It appears that *Greenfield v. Scafati*, 277 F.Supp. 644 (D. Mass. 1967) aff'd mem. 390

> U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968) controls this case.

Id. at 776.

An analogous issue was recently decided in favor of the inmate by the Ninth Circuit Court of Appeals in *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993). The issue in *Paskow* was

> whether the ex post facto clause is violated when a statutory amendment that increases a penalty to be imposed upon the revocation of supervised release is applied in a case in which the underlying offense was committed before the amendment was adopted but the conduct that led to the revocation of supervised released occurred afterwards.

Id. at 875. Although the new sanction in *Paskow* was not revocation of good time credits, the legal issue in Paskow is precisely the same issue presented to the Court herein. Relying upon *Greenfield v. Scafati*, the Ninth Circuit stated that "the ex post facto clause is violated when a parole violator is punished in a way that adversely affects his ultimate release date under a statute that was adopted after the violator committed the underlying offense but before he violated the terms of his parole." *Id.* at 883. Noting the unanimity of the circuit courts on this issue, the *Paskow* court stated:

> Circuit courts that have considered the ex post facto issue have, without exception, followed *Greenfield*, holding that the ex post facto clause is violated when a defendant's eligibility for release is adversely affected under a statute that was not in effect at the time of the defendant's underlying crime, but was adopted before the defendant committed the act for which his parole was revoked. Without exception, the circuit courts that have considered the ex post facto issue have looked to the date of the defendant's original offense, not to the date of the conduct that

> led to the punishment for the parole violation.

Id. at 879. (footnote omitted). *Accord, Cavanaugh v. Roller*, 984 F.2d 120 (4th Cir. 1993) cert. dismissed, 126 L.Ed.2d 409 (1993); *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989); *Yamamoto v. Parole Commission*, 794 F.2d 1295 (8th Cir. 1986).

2. There is No Legitimate Basis to Grant Certiorari in this Case.

Petitioners rely upon Supreme Court Rule 10.1(b) as a reason for this Court to grant the Petition, on the ground that the decision of the Court of Appeals for the Eighth Circuit below is in conflict with the decision of the South Dakota Supreme Court below on this issue. Petitioners' reasoning would result in certiorari being granted in virtually every case where a writ is granted under 28 U.S.C. §2254. Under *Humphrey v. Cady*, 405 U.S. 504 (1972), a petitioner for federal habeas relief under 28 U.S.C. §2254 must have exhausted his state court remedies prior to filing his petition in federal court. The exhaustion requirement mandates *complete exhaustion* to the court of last resort in the state where the inmate is imprisoned. *Id.* at 516. Therefore, in virtually every case that a United States Court of Appeals either grants or affirms a writ of habeas corpus under 28 U.S.C. §2254, the state court of last resort below will have decided the federal question which is the basis of the habeas in a way that conflicts with the circuit court's decision. It is absurd to suggest, as Petitioners do, that every circuit court decision granting habeas corpus to a state prisoner should be reviewed by the United States Supreme Court.

Nor do Petitioners have grounds for certiorari pursuant to Supreme Court Rule 10.1(a). All of the decisions which the Petitioners claim are in conflict with the decision of the Eighth Circuit below are, upon scrutiny, clearly distinguishable. The only decision which even comes close is *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993). *Ewell v. Murray*, however, is inapposite because it deals merely with the amendment of state prison administrative regulations, and not the amendment of statutory laws as in the case at bar. *Id.* at 483-84. Administrative regulations do not rise to the level of laws in the context of ex post facto jurisprudence, and are not subjected to ex post facto scrutiny. *Bailey v. Gardebring*, 940 F.2d 1150, 1156 (8th Cir. 1991). In South Dakota, good time credits are statutorily granted by SDCL §24-5-1 and, as made clear by the South Dakota Supreme Court below in *In re Williams*, 488 N.W.2d 667 (SD 1992), cannot be revoked absent express statutory authority. *Id.* at 669. Thus, the *Ewell v. Murray* case is not a legitimate ex post facto precedent and is clearly distinguishable from the case at bar.[1]

Indeed, it is the decision in *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989), decided four years prior to *Ewell*, which

---

[1]Based upon the above distinctions between legislative acts and administrative regulations, the Petitioners' prison administration argument falls short. Petitioners claim that "the impact of the Eighth Circuit's decision could severely limit the ability of prison officials to enact or amend rules which proscribe unsatisfactory conduct within a correctional institution." This is untrue because the ex post facto clause applies only to legislative acts, not administrative procedures. *Bailey v. Gardebring, supra.* Therefore, the Eighth Circuit's decision herein will not unduly constrict the legitimate regulatory discretion of prison administrators, so long as that discretion is exercised within the structure of constitutional legislative mandates.

controls the ex post facto issue in the Fourth Circuit. Mr. Fender was convicted of various offenses and sentenced to life imprisonment in 1973. *Id.* at 304. At that time the Virginia Code provided that Fender would become eligible for parole after serving 15 years of the sentence. *Id.* In 1985 the state's parole eligibility statutes were amended to provide that anyone sentenced to life imprisonment who escaped from prison would lose his parole eligibility. *Id.*

In 1987 Fender escaped from custody but was recaptured and convicted of one count of escape. *Id.* Thereafter the state informed him that, because of the 1985 amendment, he was no longer eligible for parole on his underlying conviction.

On Petition for Writ of Habeas Corpus, Fender argued that this law, as applied to him, was ex post facto because it effectively changed his sentence on the original conviction from life with possibility of parole to life without possibility of parole. *Id.* The district court rejected the argument, holding that the new law was "not an additional punishment retroactively imposed on Fender for his 1973 crimes. Instead it is a stiffened penalty for the later crime of escape, which occurred after the enactment of the statute." *Id.* This is the precise rationale espoused by the Petitioners herein.

Citing *Weaver v. Graham*, the Fourth Circuit held that the 1985 law was retrospectively applied to Fender because it expressly rescinded his pre-existing parole eligibility for the underlying conviction, on account of conduct which would not have resulted in the same sanction under the law existing at the time

of the original offense. *Id.* at 305. The court further held that such retrospective application of a statute modifying or revoking parole would, for prisoners who committed crimes before the statute's enactment, substantially alter the consequences attached to a crime already completed, in violation of the ex post facto clause. *Id.* at 306.

In *Fender*, as here, the government sought to avoid this conclusion by arguing that the new law did not operate retrospectively, because it was enacted before his escape and Fender, therefore, had "fair notice" of the potential consequences of such action. *Id.* Citing *Greenfield v. Scafati*, the *Fender* court held that, despite this "form over substance" argument, the "practical effect is a statutory increase in punishment for the first offense, enacted subsequent to the commission of the offense." *Id.* at 307. The Petition for Writ of Habeas Corpus was granted. *Id.*

Like the amendment in *Fender*, the 1983 amendment to SDCL §24-15-24 expressly granted authority to the parole board to revoke Respondent's pre-existing good time credits relating to the underlying conviction on account of conduct which would not have resulted in the same sanction under the laws existing at the time of the original offense. Therefore, per the *Fender* decision, the law in the Fourth Circuit is in accord with the Eighth Circuit decision below.

The other cases cited by the Petitioners in support of their Petition are all manifestly irrelevant to the issues before this Court. *United States v. Schramm*, 9 F.3d 741 (9th Cir. 1993) is

distinguishable because the sanction which Schramm received for the violation of his supervised release was available under the legislation existing at the time of his underlying offense and conviction. Therefore, he was not disadvantaged by the amended legislation. It should be pointed out that *United States v. Paskow, supra,* which is directly on point and supports the Respondent's arguments in the case at bar, was decided shortly after *Schramm* by the same court. The *Paskow* court distinguished *Schramm* at page 882, footnote 12.

Also, *State v. Bermudze*, 974 F.2d 12 (2nd Cir. 1992), cited by Petitioners is distinguished by the *Paskow* court at page 881, footnote 10.

In *United States v. Blackston*, 940 F.2d 877 (3rd Cir. 1991), and *United States v. Celestine*, 905 F.2d 59 (5th Cir. 1990), there were no ex post facto clause issues. Both cases involved the imposition of sanctions for violations of supervised release which were consistent with the laws existing at the time of the underlying offenses. It should be noted that the relevant holding from the Fifth Circuit is *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. 1981).

Again, there is no ex post facto clause issue in the case of *United States v. Green*, 810 F.2d 999 (11th Cir. 1986), contrary to the assertion of the Petitioners. In *Green* the amended legislation which enhanced Green's sentence for the crime of being a convicted felon in possession of a firearm was enacted before Green committed the offense of possessing a firearm. The same situation obtained in the case of *United States v. Patterson*, 820

F.2d 1524 (9th Cir. 1987), cited by Petitioners. *Patterson*, of course, was decided by the Ninth Circuit, which recently stated the correct analysis for ex post facto cases in *United States v. Paskow, supra*.

Finally, the Eighth Circuit decisions cited by Petitioners, *Munger v. Erickson*, 979 F.2d 1323 (8th Cir. 1992), *Garner v. Howell*, 840 F.2d 660 (8th Cir. 1988), and *Schwindling v. Smith*, 777 F.2d 431 (8th Cir. 1985), are all easily distinguishable from the case at bar and, therefore, consistent with the Eighth Circuit's ruling in this case below.

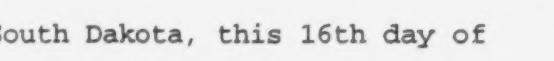
As demonstrated by the above arguments, the Eighth Circuit's decision below was required by controlling United States Supreme Court precedent and is consistent with all on-point decisions of other circuits. Consequently, there is no legitimate basis for granting the Petition for Writ of Certiorari.

CONCLUSION

For all of the reasons set forth above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Dated at Sioux Falls, South Dakota, this 16th day of February, 1995.

Respectfully submitted,



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(3)

Supreme Court, U.S.
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NO. 94-1289

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

v.

WILLIE WILLIAMS, III,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 94-1289

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

v.

WILLIE WILLIAMS, III,

Respondent.

INTRODUCTION

In this brief, the Petitioners, Joe Class, Warden, South Dakota State Penitentiary, and Mark W. Barnett, Attorney General, State of South Dakota, reply to the Respondent's argument set out in his "Opposition to Petition for Writ of Certiorari. (Op. Pet.)" It is argued therein that the present case is governed by controlling precedent and there is thus no

legitimate basis for granting the petition for writ of certiorari.[1] The obvious fallacy with the position taken by Respondent in that it is based on the erroneous premise that the outcome of this case is dictated by the holding in Greenfield v. Scafati, 277 F.Supp. 644 (Mass. 1967) aff'd mem. 390 U.S. 713 (1968). Moreover, despite Respondent's assertion to the contrary, there is also a widespread conflict between and within the

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[1]A motion was also filed by Respondent asking that the petition be dismissed for what he maintains was inadequate proof of service and filing. The Respondent asserts that the certificate of mailing executed by counsel for Petitioners failed to indicate that the petition was mailed to the clerk by first class mail and that service was thus defective since the petition was allegedly not received by the clerk before January 18, 1995. As shown in the appendix, however, Petitioners were notified in a letter dated February 1, 1995, that the petition for writ of certiorari was docketed by this Court on January 18, 1995. Addendum A-1. The Petitioners would therefore ask that Respondent's Motion to Dismiss the Petition be denied.

circuits as to when a statute is retrospective for purposes of the ex post facto clause.

A. There was no retrospective application of SDCL 24-15-24 in the instant case.

At the heart of the legal issue in this case is whether the good time forfeiture provision in SDCL 24-15-24 was applied to events occurring before its enactment and hence, retrospective in violation of the ex post facto clause. Respondent asserts that Petitioner's interpretation of "retrospective" was refuted by the court in Greenfield v. Scafati, 277 F.Supp. 644 (Mass. 1967) aff'd mem. 390 U.S. 713 (1978). Respondent maintains that the Greenfield decision was cited with approval by this Court in Weaver v. Graham, 450 U.S. 24 (1981) and is thus controlling authority in determining whether the statute challenged in the instant case was retrospective.

Petitioners, however, would submit that Respondent's reliance on Greenfield is not justified by the subsequent holding in Weaver. A review of the majority opinion rendered therein reveals that Greenfield was cited only in regard to whether Petitioner in that case was disadvantaged by application of the new statute (Florida statute ch. 944.275(1)). 450 U.S. at 32. It was not referred to in the court's discussion of whether the statute was retrospective.

Although finding, in the context of that case, that the ex post facto clause had been violated, the court in Weaver carefully noted that the statutory reduction in gain time opportunities was not related to infractions or prison behavior, but applied to inmates who complied fully with prison rules and regulations. As duly observed by the court:

> On its face, the statute reduces the number of monthly gain time credits available to an inmate who abides by

> prison rules and adequately performs his assigned tasks. . . .The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision, § 944.27(1) (1975) than he could for the same conduct under the new provision, § 944.275(1)(1979).

450 U.S. at 33, 35. In deciding whether the law changed the legal consequences of acts completed before its affective date, the court was thus, in the context of that case, forced to recast the question as whether the statute was applied to prisoners convicted for acts before the provision's effective date.

In contrast, the statute at issue in this case did not change the amount of good time credits a prisoner could earn for good behavior. The loss of good time credit is meted out only for infractions and then only prospectively. As noted by the court in In re Ramirez, 705 P.2d 897 (Cal. 1985), cert. denied, 476 U.S. 1152 (1986), there is a

"critical difference between diminution of the ordinary rewards for satisfactory performance of a prison sentence and an increase in sanctions for future misbehavior." Id. at 901.

As was the case in Ewell v. Murray, 11 F.3d 482 (4th Cir. 1983), application of the good time forfeiture provision in SDCL 24-15-24 did not add to the punishment for the original crime for which Respondent was incarcerated. That statute was applied only as the result of "new conduct" occurring after the statute was enacted and which constituted a violation of Respondent's parole. Id. at 487. The Petitioners would submit that just as good conduct allowances may be earned by compliance with reasonable prison regulations, they may be lost by subsequent noncomplying conduct. Id. at 486.

Further support for Petitioners' position can be found in Gryger v. Burke, 334 U.S. 728

(1948). In that case, this Court upheld a recidivous statute imposing augmented penalties for subsequent convictions for the same offense as applied to a criminal whose first offense occurred before the statute was passed. 334 U.S. at 732. The recidivous statute in Gryger enhanced the penalty to be imposed for future misconduct just as the good time forfeiture provision now at issue expands the action the parole board can take for the future crimes or misconduct committed by an inmate while on parole. Although both affect past wrongdoers, neither runs afoul of the aims of the ex post facto clause since the operation of each could only be triggered by future crimes. Warren v. United States Parole Commission, 659 F.2d 183 (D.C. 1981), cert. denied, 455 U.S. 950 (1982). As in Warren, the amended statute would not have affected Respondent but for his subsequent criminal behavior.

The instant case therefore does not implicate the policies behind the ex post facto clause since the statute was promulgated before Respondent was released on parole and before he committed his subsequent offenses. Warren, 659 F.2d at 194. Respondent thus knew, or is charged with notice, of the amended statute and the consequences that would await him should he commit another crime while on parole. Since the conduct triggering application of the statute occurred after its enactment, it cannot be said that the ex post facto clause was violated. Id.

In order to agree with Respondent that application of SDCL 24-15-24 violated the ex post facto clause, the Court would have to treat the subsequent parole violation by Respondent as an offense indistinguishable from the criminal conduct that led to imposition of his initial incarceration. Only then could SDCL 24-15-24 be viewed as having

been applied to conduct that preceded its enactment. A similar argument, however, was rejected in United States v. Schramm, 9 F.3d 741 (9th Cir. 1993). As stated therein, a violation of supervised release is, for purposes of the ex post facto clause, an offense separate from that which led to the initial imprisonment. Id. at 743. This same result has been reached by other circuits as well. See United States v. Bermudze, 974 F.2d 12, 14 (2 Cir. 1992); United States v. Blackston, 940 F.2d 877, 882, n.7 (3rd Cir. 1991).

B. There is a conflict between and within the circuits.

Respondent also maintains that those circuit courts which have considered the ex post facto issue have, without exception, followed Greenfield and that there is thus no conflict between the circuits as would justify

granting the petition for writ of certiorari.[2] Petitioners, however, would submit that not only is there a widespread conflict among the circuits, but there is also a conflict between the decisions of the same court of appeals. Scarborough v. United States, 431 U.S. 563, 567, n.4 (1977); Commissioner v. Estate of Bosch, 387 U.S. 456, 457 (1967).

In Fender v. Thompson, 883 F.2d 303, 304 (4th Cir. 1989), the Fourth Circuit Court of

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[2]Respondent also suggests that granting certiorari in this case because of the conflict which exists between the South Dakota Supreme Court and the Eighth Circuit Court of Appeals would result in certiorari being granted in virtually every case where a writ is granted under 28 U.S.C. § 2254. The Petitioners, however, would assert that it is the nature of said conflict which warrants the granting of certiorari in this case. Baldwin v. Alabama, 472 U.S. 372, 374 (1985). Certiorari is appropriate in a case such as this which involves a conflict between the highest state court and the Eighth Circuit Court of Appeals, both having ruled on the constitutionality of this same state statute. Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974); Ward v. Illinois, 431 U.S. 767, 770 (1977).

Appeals held that although the conduct in question took place after the effective date of the statute, an amendment to Virginia's parole eligibility statute was applied retrospectively because it rescinded parole eligibility for the underlying conviction. The court rejected the State's argument that the new law did not operate retrospectively because it was enacted before Petitioner's escape. Citing Greenfield, the Fender court held that, despite this "form over substance" argument, the practical affect was an increase in punishment for the first offense. Id. at 307. That same court, however, later reached the opposite result in Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993).

In Ewell, several inmates challenged the State's application of a newly enacted provision which created a DNA bank and imposed a loss of good time credits on any inmate who refused to provide a blood sample. Relying on

Fender, the inmates claimed that the ex post facto clause had been violated since the provisions were not promulgated until after their initial convictions. The court, however, found that the inmates' reliance on Fender did not advance their cause since the provisions in question did not add punishment for the original crime for which the inmates were incarcerated, but were imposed only as a result of new infractions. Id. at 486. According to the holding in Ewell, the State could, consistent with the ex post facto clause, reasonably increase the penalties for prospective violations. Id.

A similar conflict exists within the Ninth Circuit. In United States v. Paskow, 11 F.3d 873 (9th Cir. 1993), the court held that the ex post facto clause was violated when a statutory amendment increasing the penalty to be imposed upon the revocation of supervised release was applied to a parole violator whose

underlying offense was committed before the amendment was adopted. Relying upon Greenfield, the court in Paskow stated that one must look to the date of defendant's original offense and not to the date of the conduct which led to the punishment for the parole violation. Id. at 879.

In United States v. Schramm, 9 F.3d 741 (9th Cir. 1993), the Ninth Circuit Court of Appeals rendered a decision squarely in conflict with that in Paskow. At the time of sentencing, the applicable guidelines at issue in Schramm were silent as to whether the sentence imposed upon revocation was to run concurrently or consecutively with the sentence imposed for the new criminal offense. After defendant was sentenced, however, the guidelines were amended to provide that any term of imprisonment imposed upon revocation of supervised release was to be served consecutively. Because the guidelines had

been amended before defendant violated the terms of a supervised release, the court in Schramm found that there was no ex post facto violation. The court held that the guidelines had not been applied "retroactively" because they were not applied to conduct completed prior to their enactment. Id. at 743. Unlike Paskow, the court recognized that the triggering event was not the original offense, but rather the commission of a new infraction that occurred after the effective date of the statute.

The Petitioners would assert that certiorari is appropriate to resolve this intra-circuit conflict. The issue involved herein is both important and recurrent.

CONCLUSION

This case presents the Court with an opportunity to clarify when a statute is deemed to be retrospective for purposes of the ex post facto clause. The federal courts have

been anything but uniform when asked to consider this issue. The Court's resolution of this controversy would, therefore, lead to a more harmonious situation between the circuits. The Petitioners respectfully request this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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ADDENDUM

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 1, 1995

Mark W. Barnett
Attorney General of SD
500 E.Capitol Avenue
Pierre, SD 57501-5070

Re: Joe Class, Warden and Mark W. Barnett, Attorney General of South Dakota, v. Willie Williams, III
No. 94-1289

Dear Mr. Barnett:

The petition for a writ of certiorari in the above entitled case was docketed in this Court on January 18, 1995 as No. 94-1289.

Forms are enclosed for notifying opposing counsel that the case was docketed.

Very truly yours,

William K. Suter, Clerk

by /s/

Loretta S. Ruffin
Assistant

Enclosures